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IN THE

Supreme Court of the United States

October Term, 1968
No. 1315

JOHN S. GRIFFITH, *et al.*,

Petitioners,

vs.

COUNTY OF LOS ANGELES, *et al.*,

Respondents.

On Appeal to the California Court of Appeal, Second Appellate District, Division Two.

BRIEF IN OPPOSITION.

Opinion Below.

The opinion of the California Court of Appeal (Petition App. A) is reported at 267 A.C.A. 944 and at 73 Cal. Rptr. 773. The opinion was signed by two justices who heard the oral argument, and by another justice (Fleming, *J.*) who was not present. Petitioners sought a rehearing on this ground which was denied. Fleming, *J.*, did not participate in the consideration of this petition for rehearing. Petitioners then filed a petition for hearing in the California Supreme Court on this and other grounds which was also denied.

Jurisdiction.

The jurisdictional requisites are adequately set forth in the Petition.

Questions Presented.

Petitioners allege that at the hearing before the Los Angeles County Board of Equalization they were denied due process of law

(a) because the board excluded assessment ratio studies pertaining to *prior* years (1960 and 1961) from evidence on the ground that they were irrelevant due to changes in the assessment roll in the intervening years and because they were based on a statistically inadequate sample which was taken back in 1958,

(b) because the opinion below allegedly permits the board to disbelieve petitioners' valuation evidence which had been thoroughly impeached, and

(c) because the opinion below allegedly makes the presumption that official duty has been properly performed in the making of an assessment for property tax purposes "conclusive", even though the opinion applied the presumption only after determining that the petitioners had not made a prima facie case of assessment discrimination, that the record as a whole supported the board's implied finding that the assessments were not unfair or inequitable, and that the excluded evidence would not have changed the result (267 A.C.A. at 955).

Statutes Involved.

The pertinent statutes are set forth in the Petition.

Statement.

Seven shopping center owners herein contested their 1962 property tax assessments before the Los Angeles County Board of Equalization. The board approved the assessments.* They then sued for refunds pursuant to California Revenue and Taxation Code section 5138. Sitting in an appellate capacity, the superior court reversed the board's decision. The superior court disregarded a stipulation which had been requested at the hearing before the board by counsel for the taxpayers, and had been accepted, that the ratio of assessed value to fair market value prevailing generally in the county as of the 1962 tax lien date was 50% of the assessor's opinions of fair market value [Ex. 1, July 19, p. 35, lines 1-11]. The superior court also found that the board had committed prejudicial error by refusing to receive evidence of assessment-ratio studies for *prior* years (to wit, 1960 and 1961) as evidence of the 1962 ratio [C. T. Findings, p. 165, par. III].

The superior court also rejected the county's contention that the taxpayers had failed to sustain their burden of proof and had failed to make a prima facie case of unfair assessment before the board because their only valuation witness did not value the entire fee simple estate in each property—which is what is taxed—but valued only the lessor's interest therein, and that the board properly rejected his valuation opinions because he gave no reasons whatsoever for the capitalization rate[1] which he employed when he made the income

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*Superior Court Exhibit 1 is the transcript of these proceedings.

[1]The capitalization rate plays a "vital role" in the determination of value by the capitalization of income method. *County of Ama-*

(This footnote is continued on the next page)

studies upon which his opinions were based [C. T. Findings, p. 165, par. II].

A further consideration which was not discussed in the opinion below but which was relied on by the county in its brief[2] is that said assessment ratio conclusions were so statistically unreliable as to be inadmissible as evidence of conditions in 1962 because they were based upon a 1958 sample which was only 1/10th the size of that which the State Board itself regarded as the minimum and because almost all of the items on the county assessment roll had been changed between 1958 and 1962.

Under cross-examination by counsel for the taxpayers, the assessor repeatedly, clearly and unequivocally testified that in 1962 he assessed properties at 50% of his opinion of their respective values.[3]

Counsel for the taxpayers then requested a stipulation. He asked:[4]

> "Will you then stipulate, Mr. Early, that the ratio of assessed to fair market value prevailing generally in the County of Los Angeles as of the lien date for 1962 is 50%?"

This stipulation was accepted.

The taxpayers then asked the board to take judicial notice of the assessment ratio for the county as determined by the State Board of Equalization for *prior* years—1960 and 1961; they offered alleged summaries

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dor v. State Board of Equalization, (1956) 240 Cal. App. 2d 205 at 223, 49 Cal. Rptr. 448; *Burrit Mut. Sav. Bk. of New Britain v. City of New Britain,* (1959 Conn. Com. Pl.) 140 A. 2d 324.

[2]Appellants' Opening Brief pp. 8-9, 19-20 and 24-25.

[3]Appellants' Opening Brief pp. 5-7.

[4]Ex. 1, July 19, p. 35, line 1.

of the assessment ratios in all of the counties of the state for 1960 and 1961 [Superior Court Ex. 3; Board Exs. 1 and 2]. Neither of these documents were certified or in any way official. The county objected on the ground that assessment ratios for prior years were irrelevant, and on the ground that they were based upon a 1958 sample which was too small to be statistically reliable. The assessor testified without contradiction that the State Board of Equalization had taken no samples for this purpose in Los Angeles County since 1958[5] and that only 442 samples were then taken from an assessment roll that included 1,740,000 separate parcels of land; he also testified that from 1958 until 1962 there had been over 400,000 changes in the assessment roll each year, a total of 1,600,000 changes. The objection was sustained [Ex. 1, July 19, p. 30, lines 17-19]. No offer of proof was made.

The taxpayers also requested the board to require the assessor to produce a preliminary, tentative and unpublished study of the current 1962 assessment ratio as made by the State Board [Ex. 1, July 19, p. 38], to which objection was sustained on the ground that it was privileged and the State Board had not consented to a waiver of that privilege.[6] The taxpayers' only evidence of the value of their shopping centers was the affidavit of one Clem Glass [Superior Court Ex. 2] and the enclosures thereto. This exhibit shows that Clem Glass was not a real estate appraiser, but was a mort-

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[5]Ex. 1, July 19, p. 23, line 14.

[6]This identical ruling was approved in *Leach Corp. v. County of Los Angeles,* (1964) 228 Cal. App. 2d 634, 39 Cal. Rptr. 654 (hearing denied by California Supreme Court) and in *Web Service Co., Inc. v. County of Los Angeles,* (1966) 242 Cal. App. 2d 1, 51 Cal. Rptr. 753.

gage loan correspondent, and that he used a capitalization of income study in every case to determine value. He testified [Ex. 1, July 23, p. 10] that he had used *actual* rental income rather than the estimated fair rental income (or economic rent) of these properties in his valuation studies; nowhere did he give any reasons whatsoever for the rates by which he capitalized this income in order to determine his opinion of value.

He admitted on cross-examination that his opinion would have been different if the tenants had been different [Ex. 1, July 23, pp. 10-11], that his opinion of the value of these properties would not be the same if the rents were sustantially lower, for instance one dollar a year [at pp. 12-18], and that his opinion of value depended entirely on the terms of the existing leases and the credit standing of the tenants (at pp. 14-15). He acknowledged that a combination of the lessor's interest with the lessee's interest in each shopping center would equal "the actual fair market value of the property" [Ex. 1, July 23, p. 14, lines 1-8] but nowhere did he give any consideration to the value of the lessee's interests in these properties.

Mr. Glass also admitted that, other things being equal, according to his method of valuation a property with excellent Class A improvements would be assessed at a lower value than a similar property with poor improvements if good management produced a higher income from the property with poor improvements [at pp. 18-19].

The assessor testified that he had assessed the complete fee simple estate (*i.e.* the lessor's interests combined with the tenants' interests) in each property.

ARGUMENT.

1. The Challenged Presumption Is Not "Conclusive."

The Court of Appeal held in this case that the presumption that public duty has been properly performed and that the assessment therefore is correct justified the board in deciding against the taxpayers because they had not sustained the burden of proof (Pet. App. A p. 14). This obviously is not a "conclusive" presumption at all. It regulates the burden of proof. In 1962 it also constituted substantial evidence which could be weighed against other evidence, a rule which was abolished when California adopted Division 5, Chapter 3 Sections 600-668 of its Evidence Code in 1967 (Cal. Stats. 1965 ch. 299).

2. The Board Properly Excluded Sales Assessment Ratio Studies for Prior Years Because They Were Irrelevant and Because Based on a Statistically Inadequate Sample.

County boards of equalization are created by the California Constitution, Article XIII, Section 9. They perform a judicial function.[7] They may act only on the basis of legal evidence.[8]

In property tax equalization proceedings it is clearly established that "The assessment is presumed to be fair and the burden of proof rests upon" the taxpayer.[9]

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[7] *McClelland v. Board of Supervisors,* (1947) 30 Cal. 2d 124 at 129, 180 P. 2d 678, cert. den. 332 U.S. 823.

[8] *Universal Consolidated Oil Co. v. Byram,* (1944) 25 Cal. 2d 353 at 360, 153 P. 2d 746;
Leach Corp. v. County of Los Angeles, (1964) 228 Cal. App. 2d 634 at 637 and 641-646, 39 Cal. Rptr. 654 (hearing denied by California Supreme Court).

[9] *Bank of America v. Mundo,* (1951) 37 Cal. 2d 1 at 5, 229 P. 2d 345.

Not only is the burden of proof upon the taxpayer who charges that an assessment is excessive, but, as Justice Cardozo said, "the taxpayer must prove, not merely error, but its exact amount."[10]

The actual assessments of the properties were, of course, before the board. Whether these were excessive could be determined only by multiplying the fair market value of each property by the assessment ratio (or fraction of market value at which property throughout the County was assessed). This would show the correct assessment.[11]

We submit that the taxpayers offered no admissible evidence whatsoever to the board of the countywide assessment ratio; hence, they failed to make a prima facie case.

The stipulation that the countywide assessment ratio was 50% of the assessor's opinion of market value should have put the matter to rest. Even in its absence, we submit that the board properly refused to take judicial notice of the assessment ratio studies of the State Board for prior years as evidence of the ratio existing for the current year. The evidence showed without contradiction that 400,000 changes were made in the assessment roll every year, that the State Board's conclusions were based upon a sample taken back in 1958 and that it included only 442 items out of 1,700,000. This was too tiny to produce accurate results and too remote in time to be relevant. The sample was less than 1/40th of 1% of the assessed parcels in the

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[10] *People v. Law,* (1925) 239 N.Y. 346, 146 N.E. 622 at 624.

[11] *A. F. Gilmore Co. v. County of Los Angeles,* (1960) 186 Cal. App. 2d 471 at 476-477, 9 Cal. Rptr. 67 (hearing denied by California Supreme Court).

county. The State Board itself has estimated that over ten times this number, or 4/10ths of 1% of the total parcels, is required to constitute an adequate sample.[12]

Courts in other jurisdictions have also condemned assessment ratios based on samples as small as this one.[13]

The Arkansas ratio study is based on a 3% sample or 31,000 items.[14]

Pursuant to Illinois Revised Statutes 1957, Chapter 120, p. 627, the Department of Revenue of the State of Illinois has studied more than 40,000 sales per year to determine assessment ratios in that state.

The Petition argues at page 21 that the assessment ratios determined in California by the State Board of Equalization are used for many significant purposes. But these are the assessment ratios for the current year, not those for prior years.

The Petition also argues at page 24 that such studies have been held to be admissible by the courts of other states. Again, the opinions cited deal with ratio determination for the current year, not those for prior years.

Petitioners also argue that (pages 27 and 28) to deny the use of the assessment ratios for prior years

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[12]Report of the Senate Interim Committee on State and Local Taxation, Part Six, *Property Assessments and Equalization in California,* (1953) at pp. 267-8; Senate Interim Committee on Governmental Organization, *Equalization of Ad Valorem Tax Assessments in California,* (1957) at p. 28.

[13]*H/K Co. v. Board of Equalization,* (Neb. 1963) 121 N.W. 2d 382 at 388 held 5% of all sales in the county (466 items) to be too small.

J. Rosenbaum & Son v. Coulson, (1955) 246 Iowa 848, 69 N.W. 2d 403 held a sample of 124 parcels to be inadequate.

[14]Proceedings of the 50th Annual Conference on Taxation of the National Tax Association, (1957) W. L. Hinton, Jr., *Property Tax Equalization Program* 171 at 173.

in effect denies "any method of proof to the petitioners." This was not true. Not only could they freely make their own statistically sound sales—assessment ratio study for the current year which would be admissible in evidence, but they could also employ the technique approved in *Birch v. County of Orange,* (1927) 88 Cal. App. 82 at 85, 262 Pac. 788 at 789 (hearing denied by California Supreme Court):

> "Of course, if the taxpayer shows that his property is assessed at a greatly higher proportion of its value than that of several other persons, the inference may arise therefrom in the absence of evidence to the contrary that his assessment is disproportionate to the assessments of the County as a whole. . . ."

We submit that the Board was also justified in rejecting the taxpayers' evidence of value because their only witness did not appraise the entire fee simple estate in the various properties, but had appraised only the lessors' interests therein and had altogether ignored the value of the tenants' interests therein [Ex. 1, July 23, pp. 10-15]. That the taxpayers believed that this was the correct method of valuation is highlighted by the fact that their counsel argued with the assessor that the lessor's interest in each shopping center was all that should have been assessed and taxed [at pp. 15-16].

According to the Clem Glass method, a shopping center worth $1,000,000 would be worth only half as much as a second shopping center worth $1,000,000 if its owner leased it for a rental only half as great as the rental income from the second shopping center. The

witness apparently did not understand that when property is leased to a tenant for less than its economic rent, the value of the lessor's interest is decreased while the value of the tenant's interest is proportionately increased and the over-all value of the fee remains unchanged. Thus, there is no change in the fee value of a property worth $1,000,000 when leased for $1 a year; the fee value consists of the value of the interests of the lessor combined with the value of the interests of the tenants and the total remains $1,000,000. Hence, when property is valued by capitalization of the *actual* rental income therefrom (instead of its estimated fair rental) the appraiser must also determine the value of the tenant's interest and combine it with the value of the lessor's interest in order to ascertain the fee value.

The law requires, of course, that the entire fee simple interest be assessed and taxed even if the owner has leased the property to tenants at a rental so low that it might not be sufficient to pay the property taxes. *Graciosa Oil Co. v. Santa Barbara,* (1909) 155 Cal. 140, 99 Pac. 483.

The Clem Glass approach has been repeatedly rejected by the courts. For instance, the Supreme Court of Appeals of Virginia has stated that "If I owned land worth $10,000 I cannot escape taxation by renting it to a friend at one dollar a year."[15]

Other cases to the same effect include:

In re Property of Pine Raleigh Corp., (1963 No. Car.) 128 S.E. 2d 855 at 859;

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[15] *Richmond, Fredricksburg and Potomac RR Co. v. Commonwealth,* (1962) 203 Va. 294, 124 S.E. 2d 206 at 211.

New Brunswick v. State of New Jersey Division of Tax Appeals, (1963) 39 N.J. 537, 189 A. 2d 702 at 706;

Donovan v. City of Haverhill, (1923) 247 Mass. 69, 141 N.E. 564.

Furthermore, the witness Glass gave no reason whatsoever to justify the extraordinary capitalization rates that he used. The capitalization rate is critical when valuing property by the capitalization of income method. For instance, an income of $100,000 capitalized at 4% indicates a value of $2,500,000; capitalized at 6%, it indicates $1,666,667; capitalized at 10%, it indicates only $1,000,000. The witness generally used a 10% capitalization rate and in some instances went as high as 12% and 15% [see his appraisal of El Rancho Shopping Center, Superior Court Ex. 2]. It is almost trite to say that "An expert opinion is no better than the reasons given for it."

3. In an Attempt to Show That California Taxpayers Lack an Effective Remedy for Inequitable Assessments, the Petitioners Misstate Many Aspects of California Law.

Petitioners complain on page 26 that in the *Leach* case, *supra,* "The unsubstantiated ratio testimony of the assessor . . . was nevertheless held to be substantial evidence." The Petition overlooks the fact that this resulted because in that case the taxpayers themselves called the assessor as a witness and asked for his opinions without establishing either his qualifications or the factual data on which his conclusions were based. As the

opinion says, "This necessarily amounted to a waiver" of such substantiation.[16]

The Petition also on page 26 complains that in *County of Los Angeles v. Assessment Appeals Board No. 2,* (1968) 267 A.C.A. 935, 73 Cal. Rptr. 469 the opinion holds that the owner's opinion of value without substantiation would be accepted as substantial evidence. This is a distortion of what that opinion holds. In fact it held that even if the unsubstantiated owner's opinion of value in that case were to be accepted, "there would still be absolutely no evidence in the record upon which to base" the board's decision, and then proceeded to reverse that decision.

The petitioners murmur about the lack of findings by the board [at p. 26]. They point to no respect in which the court was handicapped in reviewing the board's decision because of the lack of such findings. None were requested and none were then required by statute or custom.[17]

At page 17 petitioners also complain that Los Angeles County is presently (*i.e.* 1969) ignoring an amendment to California Revenue and Taxation Code Section 1609.2 (Calif. Stats. 1968 ch. 1213) which provides that the hearing before a county board of equalization "need not be conducted according to technical rules relating to evidence and witnesses." As originally proposed to the California Legislature this bill (A. B. 1960) used the expression "shall not" which was amended to read "need not." The Petition overlooks

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[16]*Leach Corp. v. County of Los Angeles,* (1964) 228 Cal. App. 2d 634 at 641, 39 Cal. Rptr. 654 (hearing denied by California Supreme Court).

[17]This rule was changed by California Revenue and Taxation Code Section 1605.5, (Calif. Stats. 1967 ch. 285).

the fact that Section 9.5 of Article XIII, California Constitution, which was adopted in 1962 provides that where assessment appeals boards are created in a county to perform the function of a county board of equalization, the county board of supervisors—and not the Legislature—shall adopt rules of procedure for such boards. In other words, Section 1609.2 does not apply to those counties such as Los Angeles where assessment appeals boards have been created.

Conclusion.

There is nothing unique in the decision below. The judgment correctly applies basic principles regarding the burden of proof to the facts established by the petitioners' own evidence. No substantial federal question is involved. We respectfully submit that the Petition should be denied.

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